1975

Utah State Road Commission v. Wilburn D. Helm and Marie L. Helm, his wife; Theresa Dambrosi; Uinta Oil Refining Company; and Central Bank and Trust : Brief of Respondent

Utah Supreme Court

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W. Robert Wright; Jackson B. Howard; Attorneys for Respondents.

IN THE SUPREME COURT OF THE STATE OF UTAH

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UTAH STATE ROAD COMMISSION,

Plaintiff-Appellant,

vs.

Case No. 14181

WILBURN D. HELM and MARIE L. HELM, his wife; THERESA DAMBROSI; UINTA OIL REFINING COMPANY; and CENTRAL BANK & TRUST,

Defendants-Respondents.

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BRIEF OF RESPONDANT UINTA OIL REFINING COMPANY

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APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE GORDON HALL, JUDGE, PRESIDING.

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BRIEF OF RESPONDANT UINTA OIL REFINING COMPANY

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STATEMENT OF THE CASE

This is an action in condemnation by the State Road Commission to acquire real property for the widening of West 3500 South.

DISPOSITION IN LOWER COURT

This matter was tried to a jury for three days in the District Court of Salt Lake County, Judge Gordon Hall presiding. A verdict was returned in the amount of $34,000.00 for the "taking" and $16,983.00 severance damages, for a total damages of $50,983.00. Of the total, $14,000.00 was awarded respondant Uinta Oil Refining Company as lessee of certain of the real property condemned.

RELIEF SOUGHT ON APPEAL

Respondant Uinta Oil Refining Company seeks affirmance of the judgment on the verdict in its favor and an award of costs for this appeal.

STATEMENT OF THE FACTS

Plaintiff Road Commission condemned a portion of real property owned by the Defendants Wilburn D. Helm, Marie L. Helm and Theresa Dambrosi (hereinafter the "fee owners") on the south-west corner of 3500 South and 1400 West in Salt Lake County. The Defendant Uinta Oil Refining Company (hereinafter "Uinta" or the "leaseholder") had a lease on a portion of the property condemned measuring 175 feet along 3500 South and 173 feet in depth. This lease commenced on January 1, 1972, and ran until December 31, 1982. (Exs. 7, 8, 9). The rent payable on the lease was $250.00 per month to the end of the lease. (Tr. 15). At the time of condemnation on April 30, 1974, the lease had 8 years and 8 months to run.

The General Manager of Uinta, W. B. Robins, who has evaluated properties for leasing since 1937 for the operation of service stations, testified that the economic or market value of Uinta's lease on the date of condemnation, April 30, 1974, taking into account the then condition of the property, was $650.00 per month. (Tr. 34, 21, 22, 54).

Another witness, James E. Ashton, who has spent a lifetime in evaluating and acquiring new sites for service station operations, testified that the economic value of Uinta Oil's lease as of the date of condemnation, April 30, 1974, was $500.00 per month.

Another expert, Frank K. Stuart, a CPA and an economist, who has expertise in mathematics, accounting, and economic theory, testified that the discounted value on April 30, 1974, of $400.00 per month for the 8 years and 8 months remaining on the lease was $32,145.78. (Tr. 201). The $400.00 per month being the difference between the "contract rent" of $250.00 and an "economic rent" of $650.00 testified to by Mr. Robins. This difference is often referred to as the "bonus rent". Taking Mr. Ashton's smaller figure for economic rent of $500.00 per month, Mr. Stuart calculated the resultant $250.00 bonus rent ($500.00 less contract rent of $250.00) to have a discounted value for the remaining term of the lease of $20,911. (Tr. 199). This court has approved this method of valuing the lessee's interest. State of Utah v. W. Roy Brown, et al., Utah 2d , 531 P.2d 1294 (1975).

The jury was properly instructed that the valuation date was the date of condemnation, April 30, 1974. (R. 117, 125, 127, 128, 130). After approximately four hours of deliberation

(Tr. 321, 327), the jury returned a verdict of $14,000.00 in favor of Uinta as part of the total verdict it rendered for the value of the taking and of the severance damages of $50,983.00.

ARGUMENT

POINT ONE

THE PROPERTY VALUATIONS WERE MADE AS OF THE DATE OF SERVICE OF SUMMONS, APRIL 30, 1974. THE STATE'S CONTENTION TO THE CONTRARY IS ABSURD.

All the testimony at trial regarding the value of the property was as of April 30, 1974, the date of service of summons. Mr. Robins testified on direct examination that the value of the lease as of April, 1974, the date of condemnation, was $650.00 per month. (Tr. 21-22, 33-34). When cross examined by Mr. Ward, the State's attorney, Robins confirmed the use of that date:

> Q. I am talking about your valuation, is that what you testified to in direct examination?
>
> A. My valuation was based upon the April, 1974 date, yes, sir. (Tr. 54).

Mr. Ashton used the same date.

> Q. Now, based upon the evaluation that you have just described and upon the experience you have had, do you have an opinion as to the value of the sublease on this property that was held by Uinta Oil Refining Company as of June 30, 1974?
>
> A. Yes.

THE COURT: You mean, April 30th, 1974?

MR. WRIGHT: Excuse me, April 30th, 1974.

A. Yes.

. . .

Q. What is that opinion?

A. My opinion is that the lease of that station would be $500.00 a month.

Plaintiff's expert accountant-economist, Mr. Stuart, used the same date, April 30, 1974, for his calculations. (Tr. 199, 201).

The jury was instructed in the court's charge to value the property as of April 30, 1974. (R. 117, 125, 127, 128, 130).

Appellant in its brief on Page 4, states: "The parties were in agreement that the date of valuation was on the date of the service of summons which was on or about April 30, 1974". How then does the Appellant on Page 2 of its brief under RELIEF SOUGHT ON APPEAL state: "[A]lso sought is a determination by the Supreme Court of Utah that the value of property sought to be acquired by eminent domain is determined by its value on the date on which there is service of summons"? No date other than the April 30, 1974 date was ever used in valuing the property.

However, during the direct examination of Mr. Robins, the State was allowed to introduce a photograph showing that as of the date of condemnation, the property was not being operated as a service station. Therefore, on direct examination, Mr. Robins was asked to explain why the property was not being so used on that date. This explanation was necessary for the jury to be fairly informed because the property was valued by all of Uinta's witnesses, as well as those of the fee owners and of the State, as a service station property. Apparently it is this explanation which Plaintiff claims was not admissable.

The law has long been established in this state that all factors bearing upon value that a prudent purchaser would take into account should be given consideration, including any potential development reasonably to be expected. State of Utah, by and through its Road Commissioner v. Wooley, et ux., 15 Utah 2nd 248, 399 P.2d 860 (1964); Weber Basin Water Conservanc District v. Ward, 10 Utah 2d 29, 347 P.2d 862 (1959). Uinta was entitled to explain why, since the property was being valued as service station property, it was not being so operated on the date of condemnation. Any reasonable explanation was admissable under the cases just cited. Merely because the reason given was because the fact that the property was going to be condemned became known and made it impossible to find an

operator, did not make the explanation inadmissable. Surely the State can't claim that any factor reasonably affecting the potential use of the property is admissable, except if the controlling factor involves the State of Utah.

As conclusively shown above, the property was valued in its then condition as of the date of service of summons. No claim was ever made for damages which may have occurred by reason of the threat of condemnation. No claim was ever made for a decrease in value of the property from the time the service station was closed in 1970 to the date of condemnation in 1974. The rule of State v. Bettilyon, 17 Utah 2d 135, 405 P.2d 420 (1965), cited in plaintiff's brief, was applied by the trial court and strictly followed. Mr. Robins' testimony did not vary that rule in the slightest. All it did was merely explain why the station was not operating when the property was condemned. There was no error in admitting this testimony.

POINT TWO

THE DISTRICT COURT CORRECTLY REFUSED TO ADMIT INTO EVIDENCE THE GALLONAGE REPORT OF THE STATION ON THE PROPERTY COVERING A TIME PERIOD WHICH ENDED FOUR YEARS PRIOR TO THE DATE OF CONDEMNATION.

The trial court properly kept out of evidence the out-dated gallonage report of the station on the subject property which was closed four years prior to condemnation. The date was simply too remote to have any probative value. Furthermore, it was obtained by the State from Uinta pursuant to settlement

negotiations. Plaintiff's claim that it should have been admitted because the defendant's expert valuation witness testified about some high gallonage figures which the State had a right to rebut, is likewise ill founded. On direct examination, each of the defendant's expert witnesses who gave an opinion of value, gave the factors considered by them in giving their opinion. None even mentioned the out-dated gallonage figures. On cross examination by the State, however, without even attempting to establish that those figures were relied upon by the experts, Mr. Ward asked what these figures were. Over objection by defendant's counsel that these figures were immaterial, Mr. Ward pursued the matter with Mr. Ashton and got a response that he remembered one month's volume of 65,000 gallons (Tr. 123). On cross examination, Mr. Harding testified he didn't concern himself with these figures because the station had been closed but remembered a high figure of 66,000 gallons per month (Tr. 173). The factors given on direct examination by these witnesses in determining their opinion of value did not include these out-dated gallonage figures. The state failed to establish anything to the contrary. The State's claim now that it should have been able to rebut the immaterial evidence, which it intentionally put in the record on cross examination, should be rejected out of hand. The State's claim that it should have been allowed in closing argument to comment on the defendant's failure to put into evidence these immaterial, out-dated figures should also be summarily rejected. As plaintiff

points out at length in its brief, the valuation date is April 30, 1974, not four years earlier.

POINT THREE

ALL ERROR COMPLAINED OF BY PLAINTIFF, IF ERROR AT ALL, WAS HARMLESS AND DOES NOT JUSTIFY REVERSAL.

As demonstrated above, Uinta strongly contends that no error occurred with respect to the admission of Mr. Robins' explanation why the station was not operating on the date of condemnation nor by the rejection of the out-dated gallonage summary, Exhibit 13-P. Plaintiff's claim that this court should reverse the judgment because the trial court admitted photographs of the service station being demolished (Exs. 3.7, 3.8, 3.9, 3.10 and 3.11) is also without merit. Surely, the fee owner defendants had the right to demonstrate visually a fact that the state admitted, that the station had been completely torn down. This fact had a definite effect on severance damages.

However, should this court for some reason determine that any of the trial court's actions complained of were error, none constitute sufficient error to grant a reversal of the judgment on the jury verdict. This court has repeatedly held that where a trial has been afforded, a presumption arises that the judgment should not be disturbed unless the appellant meets the burden of showing error substantial and prejudicial

in the sense that there is a reasonable likelihood that the result would have been different in the absence of such error. Simpson v. General Motors, 24 Utah 2d 301, 470 P.2d 399 (1970); Hall v. Blackham, 18 Utah 2d 164, 417 P.2d 664 (1966); Rivas v. Pacific Finance Co., 16 Utah 2d 183, 397 P.2d 990 (1964). No such error has been shown here. The testimony and the instructions clearly demonstrate that the property was valued as of the date all parties acknowledge was proper - April 30, 1974. The jury was so instructed. No witness valued the property based upon, in part or whole, the out-dated 1970 gallonage figures. What the station may have pumped four years before condemnation is far too remote in time to be relevant, especially with the changing traffic pattern and traffic counts about which testimony was given. (Tr. 94). The State stipulated that the station was demolished. Seeing a picture of the same could not constitute reversable error under the standards set forth in the Simpson, Hall, and Rivas cases cited above.

A survey of the entire record clearly reveals that Plaintiff had a fair opportunity to present its claims to the court and the jury for determination. There is, therefore, a presumption in favor of the verity of the verdict and judgment, including all aspects of the conduct of the proceedings and rulings of the

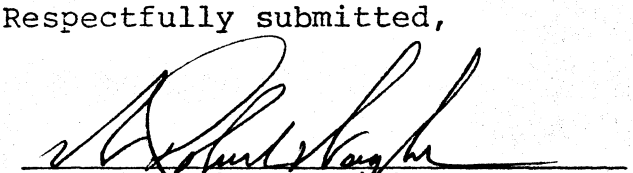
court. Plaintiff failed to meet its burden of showing that there was substantial and prejudicial error to overcome that presumption.

CONCLUSION

Nothing complained of by the Plaintiff constitutes error by the trial court. In any event, the Plaintiff has entirely failed in its burden of showing prejudicial and substantial error which deprived it of a fair trial. Plaintiff has, therefore, also failed in overcoming the presumption of the verity of the judgment on the verdict.

The judgment should be affirmed.

Respectfully submitted,



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